DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

DANNY NIXON, Petitioners, vs. MO SWANG PRODUCTIONS, INC., JSJ PRODUCTIONS, INC.; MONTEL JORDAN; and KRISTEN HUDSON, Respondents.	Case No. TAC 30-00 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on September 18, 2000, by DANNY NIXON (hereinafter Petitioner or "NIXON"), alleging that MO SWANG PRODUCTIONS, INC., JSJ PRODUCTIONS, INC., MONTEL JORDAN and KRISTEN JORDAN, (hereinafter Respondent or "MO SWANG"), acted as a talent agency by procuring work with third parties for the petitioner without possessing the required California talent agency license pursuant to Labor Code §1700.5[1]. Petitioner seeks a determination voiding *ab initio* various agreements entered into

[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

between the parties which enabled the petitioner to produce songs for clients of the respondent's music production company.

Respondent filed his answer on December 22, 2000, asserting various affirmative defenses including, unclean hands, waiver, estoppel, and the petition was filed untimely and therefore should be barred by the statute of limitations set forth at Labor Code §1700.44(c). Respondent filed a pre-hearing brief on April 24, 2001, alleging the parties relationship was that of an employer/employee and consequently, the Labor Commissioner is without jurisdiction to hear the matter. A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on April 27, 2001, in Los Angeles, California. Petitioner was represented by Hayes F. Michel and William M. Brockschmidt of Proskauer Rose LLP; respondent was represented by Allen B. Grodsky and Eric M. George of Browne & Woods LLP. Due consideration having been given to the testimony, documentary evidence, arguments and briefs presented, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

1. Danny Nixon is a talented musician who began playing keyboards for the popular Montel Jordan band at an early age. Soon thereafter, Jordan established Mo Swang Productions, Inc., which offered producing, songwriting and mastering services for musical entertainers, record companies and other music producers. The respondent describes MO Swang as an all-encompassing production

house. To provide a full array of production services to its clients, Mo Swang hired a stable of musical "producers" to work for his production business. The "producers" would render their talents by mixing tracks, writing lyrics and/or melodies and utilizing any combination of production skills, ultimately intended to create a "master recording" to be sold to the purchaser or client of Mo Swang. Sometimes the purchaser would seek a song or track from any one of Mo Swang's stable of producers who could provide the requested material, and other times, the purchaser would request a specific producer of Mo Swang to arrange the recording. Nixon, eager to learn these various skills, hung around the studio initially programming the drum machine and eventually absorbing and practicing the skills necessary to create and produce "master" recordings. Nixon displayed a tremendous aptitude for producing and was eventually offered an "Exclusive Producer Agreement" (hereinafter Agreement) by Jordan.

2. In June of 1998, the parties entered into the Agreement whereby Mo Swang would "present producer [Nixon] to record companies and artists to negotiate for purposes of obtaining furnishing agreements."[2] In a nutshell, if the client approved of the producer or his work, the client would enter into a "furnishing Agreement" with Mo Swang. The producer would be contracted to create a recording or "master", and upon final approval of the product, the client would market the song for distribution. Mo Swang would typically receive an advance and if the recording

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[2] The "furnishing agreement" was a contract between Mo Swang and the purchaser or "distributor" of the recording which provided the terms, conditions, legal obligations and rights of the "producer", "distributor" and Mo Swang.

landed on a CD, Mo Swang and the producer would receive royalties from the distribution of the master recording pursuant to the terms of the furnishing agreement.

3. The "Exclusive Recording Agreement" between the parties established Nixon's responsibilities and provided for his compensation under the contract. Nixon was guaranteed a minimum salary, including a publishing advance and a minimum advance which was paid in equal monthly installments. Nixon was guaranteed $50,000.00 for his first year as a Mo Swang Producer. If Nixon produced a master recording, mixed or remixed a previously recorded master he would be paid a predetermined amount which would be credited against his $50,000.00 advance. Similarly, if the master commercially sold, thirty percent (30%) of the royalties collected from the master by Mo Swang pursuant to the furnishing agreement would also be credited against Nixon's minimum advances. If the amounts paid to Nixon in royalties and/or masters exceeded Nixon's advances, that additional compensation would be paid directly to Nixon. In short, Nixon was paid a draw against commissions.

4. Throughout 1998, the petitioner created a limited number of masters and received minimal royalties to be credited against his advances. As Nixon developed his skills as a producer, he soon emerged as a talented artist and quickly his specific talents were in demand by outside purchasers. In June of 1999, Nixon renegotiated his "exclusive producer agreement" and received an increase in advances. In addition, the royalties credited against his advances were increased to fifty percent (50%) of the total royalties collected by Mo Swang for Nixon's work sold to

major labels.

5. Nixon soon began producing tracks for various third party clients of Mo Swang, including, Tamia, Boyz to Men, Coco, Maxi Preist, Kelly Price and Darius Rucker among others. Several artists insisted that Nixon specifically produce the tracks and requested that Nixon specifically be a party to the furnishing agreements in conjunction with Mo Swang. This request was ostensibly to assure the purchaser that Nixon was aware of all of the material terms. Throughout 1999, Nixon's masters were routinely purchased and consequently, Mo Swang reaped the benefits through advances and royalties. Nixon became increasingly discontented with his compensation structure when he realized the substantial amounts of money Mo Swang collected stemming directly from Nixon's creative efforts.

6. In response to Nixon's complaint, the respondent argued that it was Mo Swang who covered all of the production costs associated with producing, and moreover it is Montel Jordan's name that attracts the clients. Nixon is simply an ungrateful Mo Swang "in-house" employee[3] who has reaped substantial benefits by way of a regularly increased salary and unlimited training and experience.

7. In early 2000, as Nixon's unhappiness with his compensation scheme continued, he again sought additional monies. The dispute between the parties elevated and in March of 2000, a settlement agreement was executed. The settlement agreement provided for, *inter alia*, an increase in the percentage [now 80%]

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[3] Section 17 of the "Exclusive Producer Agreement" provides: "Nothing contained in the Agreement shall be deemed to create the relationship of employer-employee or any other relationship other than that of independent contractor between Producer and Company..."

of total royalties collected by Mo Swang used to offset Nixon's advances for specific furnishing agreements. The settlement agreement did not alleviate the problems between the parties and in September of 2000, the instant petition was filed with the Labor Commissioner.

CONCLUSIONS OF LAW

1. The sole issue for consideration is whether the petitioner is an employee of Mo Swang, or conversely, whether the petitioner is an independent contractor and the respondent has acted as an unlicensed talent agency seeking to procure employment for the petitioner with third parties. If it is determined that Nixon and Mo Swang possess an employee/employer relationship and not an agency relationship, then the Labor Commissioner is without jurisdiction to hear this matter.

2. The logical conclusion is that Mo Swang was Nixon's employer and Nixon was not an independent contractor whereby Mo Swang sought to seek employment opportunities on his behalf.

3. The leading California case on the issue of whether a service provider is an independent contractor or an employee is Borello & Sons v. Department of Industrial Relations (1989) 48 Cal.3d 341. In the words of the Borello court, "[t]he determination of employee or independent contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences....If the evidence is undisputed, the question becomes one of law." Id., at p. 349. The conclusions set forth herein are

founded upon the undisputed evidence presented at the hearing.

4. In Borello, the California Supreme Court rejected the traditional common law focus on control of work details as the critical determinative factor in analyzing a service relationship. Instead, the Borello court adopted a multi factor test, which includes, in addition to the extent of the principal's right to control the manner in which the work is performed, the following factors: whether the person performing the services is engaged in a business or occupation distinct from that of the principal, or whether the services rendered are part of the regular business of the principal; whether the principal or the worker supplies the instrumentalities, tools, and the place in which the work is performed; whether the person providing the service has an opportunity for profit or loss based on his managerial skill; the degree of permanence of the working relationship, whether the service requires special training and skills characteristic of licensed contractors; and whether or not the parties believe they are creating an employer-employee relationship.

5. The Supreme Court noted that the various individual factors that must be considered "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Id., at 351. Thus, the absence of control over work details is of no consequence "where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purposes favors a finding "that the person providing the

service is an employee of the principal and not an independent contractor. "Yellow Cab Cooperative, Inc. v. Workers Compensation Appeals Bd. (1991) 226 Cal.App.3d 1288, 1295, citing to Borello, supra, 48 Cal.3d at pp.355-358.

6. Here, the principal retains pervasive control over the operation as a whole, and the petitioner's work is an integral and necessary element of respondents' production company. All master recordings are an indistinguishable part of the principal's production business and without the producer's efforts, Mo Swang's full service production house would not be that. It is the producer's services in creating masters that make-up the regular business of the principle. "This permanent integration of the workers into the heart of [the] business is a strong indicator that [the principal] functions as an employer ... The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business service." Borello, supra, at p.357.

7. Turning to the remaining Borello factors, Mo Swang provides the customers, the facilities, the studio, equipment, and all other conceivable tools of the production business. These facts point very strongly in the direction of an employer-employee relationship.

8. The petitioner does have a meaningful "opportunity for profit or loss" based on his "managerial skills." Nixon's ability to earn more or less is primarily dependent on the number of projects sold and distributed. The creative nature and ultimate

success of Nixon's work would dictate the amount of compensation he received.

9. Finally, the terms of employment were contained within the Agreement. The Agreement provided for a one-year term with three one-year irrevocable options. A four-year contract is sufficiently permanent to invoke a presumption the parties entered into an employee/employer relationship. The so-called sharefarmers found to be employees in Borello had signed agreements to provide services during a sixty-day harvest season. Despite the seemingly temporary nature of this arrangement, the court observed that this seasonal work is permanently integrated into the grower's business, that many of the same "sharefarmers" return to their positions in following years, and that "this permanent integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer under the Act." Id., at p. 357. Moreover, Nixon entered into an exclusive contract with Mo Swang and was therefore precluded from conducting producing services for any other employer or party.

10. The contract expressly maintains that the relationship is that of an independent contractor. Nixon's testimony was unavailing as to what his intent of the relationship was, while Mo Swang and their transactional attorney maintained this provision was inserted at the request of Nixon, who simply desired to file his own taxes. In Borello, the ostensible intent of the parties, is treated as one of the least significant factors. In this respect, this characterization is similar to those reviewed by the courts in Borello and Yellow Cab, and there is no reason to

give this fictional characterization any more weight than did those courts. "Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as a condition of employment, the workers' acquiescence in that characterization does not by itself establish a forfeiture of the [law's] protections." Yellow Cab v. Workers Comp. Appeals Bd., supra, 226 Cal.App.3d at pp. 1301-1302. "An employer cannot change the status of an employee to one of an independent contractor by illegally requiring him to assume a burden which the law imposes directly on the employer." Toyota Motor Sales v. Superior Court (1990) 220 Cal.App.3d 864, 877. While Borello discussed the statutory protection an employee receives under other remedial legislation, (i.e., worker's compensation), the factors and analysis discussed under Borello remain an indispensable tool in determining the nature of an employment relationship. When weighing these various factors, it is clear that the relationship between the parties was that of an employee/employer under Borello's criteria.

11. The petitioner maintains, "[t]his employee versus independent contractor is the ball game, and petitioner wins it, based on Respondents' own authority." We disagree. The gravamen of petitioner's claim is that Mo Swang presented Nixon's artistic creativity to third parties, in the hopes that they would engage his services and this activity implicates the Talent Agencies Act. In support of this proposition, petitioner [and respondent] advance Rose v. Reilly (1998) TAC 43-97. Rose involved a director who was hired by a commercial production company to act as the production

companies "in-house" commercial director. The director and owner of the production company created a visual resume which the director utilized to obtain jobs for the production company. The hearing Officer in Rose concluded that an employment relationship did not exist, and the production company indeed procured work for the director. But he stated, "the question [is one] of fact, and turns on the details of the arrangement between the parties." Rose, supra. at pg 5.

The primary factors used by the hearing officer in reaching that conclusion were that the respondent did not compensate the petitioner for his services in the preparation of the visual resume. Here, Nixon was compensated for all work done in preparation for his master recordings. Also in Rose, the petitioner was not employed on a day-to-day basis, and was not provided with a regular salary, and instead was only compensated when a successful bid was accepted by a third party for a project. Our case is clearly distinguishable in that Nixon was employed daily. Nixon testified that he worked six days a week and twelve hours a day. Also, Nixon was guaranteed a monthly salary. The hearing officer in Rose also indicated that "it seems unlikely that he [petitioner] would have agreed to an exclusive employment contract which provided compensation only when, as, and if respondent was successful in bidding on a project." Rose, supra. at pg. 5. In our case, it is clear by the terms of the agreement that Nixon did agree to an exclusive deal, further distinguishing Rose.

Finally, the hearing officer in Rose added, "[i]t is certainly possible that a television production company might hire

a director as an employee, compensated on a salary or other basis ... It is then possible that such a production company, could bid on projects, and complete such projects, without having acted as a talent agency." Rose, supra. at pg. 4. That is precisely the scenario here. In short, based upon the testimony of the parties, applicable case law, and our reading of all past Labor Commissioner Determinations, we find overwhelming evidence for the conclusion that Nixon is an employee of Mo Swang rather than an independent contractor.

12. To hold that Mo Swang is subject to the Talent Agencies Act in this employment situation, would create the possibility that every employer engaged in production, employing workers who provide creative services, would run the risk of violating the Act. Additionally, in those situations, as here, where an apprentice, artist, employee reaches some arbitrary point, or achieves a certain commercial success, or is specifically requested by a third party, the employer must determine when that occurs and either divest themselves of those employees or face potential Talent Agency Act litigation. This potentially would expand the Act beyond reasonable boundaries and create a burden on legitimate employers that would make compliance with the Act untenable. As an enforcement agency on the one hand, we must create standards to effectuate the Act's remedial purpose, and on the other hand we must establish guidelines that make compliance an achievable goal. Notably, when a production company hires creative talent, the facts of that relationship must be carefully analyzed. The status of the relationship will be a question of fact that must be addressed on a case-by-case basis. The

conclusion drawn here is limited to this specific set of facts.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the petition to determine controversy under Labor Code §1700.44 is dismissed due to a lack of controversy within the meaning of the Talent Agencies Act.

Dated: October 3, 2001

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 10-3-01

ARTHUR S. LUJAN
State Labor Commissioner

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL

(C.C.P. §1013a)

DANNY NIXON VS MO SWANG PRODUCTIONS, INC.; JSJ PRODUCTIONS, INC.; MONTEL JORDAN; AND KRISTEN HUDSON
SF 030-00 TAC 30-00

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On October 3, 2001, I served the following document:

AMENDED NOTICE OF HEARING

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2001, at San Francisco, California.

BENJAMIN CHANG